IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 19

HAROLD FAHY and WILLIAM ARNOLD,
Petitioners,

—versus—

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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STATE OF CONNECTICUT,
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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

Harold Fahy and William Arnold, petitioners herein, respectfully pray that a writ of certiorari issue to review the final judgment of the Supreme Court of Errors of the State of Connecticut entered on the 26th of June, 1962, affirming the judgments of the Superior Court for Fairfield County at Bridgeport convicting petitioners of the felony of willfully injuring a public building.

OPINION BELOW

The opinion of the Supreme Court of Errors is reported at ——— Conn. ——— and at 183 A. 2d 256 and appears in Appendix B, *infra*, p. B-1.

JURISDICTION

The judgment of the Supreme Court of Errors was entered on June 26, 1962. The jurisdiction of this court is invoked under 28 U. S. C. § 1257 (3). The constitutional question was originally raised in the trial court (R. 11, T. 40)* and assigned as error (R. 13) to the Supreme Court of Errors, which ruled specifically thereon (*infra*, Appendix B).

QUESTION PRESENTED

May a violation of petitioners' constitutional rights properly be characterized by the Connecticut Supreme Court of Errors as harmless error not warranting a new trial where that Court found that evidence obtained through an illegal search and seizure was erroneously considered by the trier of fact and where the illegally seized evidence not only was recited in the finding of the trial court, but also formed the basis for the admission of other evidence of guilt which was likewise considered by the trier of fact?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment.

STATUTORY PROVISION INVOLVED

The statute involved is Section 53-45 of the Connecticut General Statutes (1958) as amended by Public Act 437 (1959), *infra*, Appendix A-1.

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*The parenthetical numbers prefaced by the letter "T" refer to the pages of the certified transcript of the trial court proceeding. The parenthetical numbers prefaced by the letter "R" refer to pages of the certified record on appeal to the Connecticut Supreme Court of Errors.

STATEMENT OF THE CASE

Petitioners were charged in informations dated February 10, 1960, with willful injury to public property in violation of Connecticut General Statutes Sec. 53-45, a felony (R. 1-2, 4-5). Petitioners pleaded not guilty and were tried before Bogdanski, J. in the Superior Court for Fairfield County at Bridgeport on June 28, 1960 and were found guilty as charged and sentenced to sixty (60) days in the County Jail at Bridgeport (R. 3, 7).

On February 1, 1960, between the hours of 4:00 and 5:00 a.m. swastikas were painted with black paint in several places on the Synagogue Beth Israel in the City of Norwalk, Connecticut. (R. 10) At about 4:40 a.m. on that date, Officer Osborne Lindwall of the Norwalk Police Department saw an automobile without headlights operating on a public highway in Norwalk about a block away from the synagogue. (R. 10) The officer pursued the vehicle and caused it to stop. (R. 10) Petitioner Fahy was driving this vehicle and petitioner Arnold was a passenger therein. Officer Lindwall searched the vehicle and questioned petitioners about their reason for being out at that hour. Petitioners told him that they had been out for coffee at a diner and were returning to Fahy's home. In the course of searching the car, Officer Lindwall found a jar of black paint and a paint brush but did not remove them. (R. 10, T. 16) After completing his search and questioning of the petitioners, Officer Lindwall released them and they returned to Fahy's home. (T. 25) Later the same morning Officer Lindwall learned of the painting of the swastikas upon the synagogue, and thereafter at approximately 7:30 a.m. he went to petitioner Fahy's home and, without possessing a search warrant or obtaining the permission of the petitioner, entered the garage located under the Fahy home and removed a jar

of paint (State's Exhibit E) and a two-inch paint brush (State's Exhibit F) from a parked car. (R 11)

Counsel for the petitioners were precluded by the trial court from examining Officer Lindwall in an effort to establish that the paint jar and the paint brush were obtained through an unlawful search and seizure. The trial court found that:

> "Officer Lindwall testified that he went to the Fahy home on Wilson Point in South Norwalk before obtaining a warrant for the arrest of either defendant and before he had obtained a search warrant to search the premises, and entered the garage of the Fahy home which is situated under the house. He then removed the paint and paint brush allegedly used to apply paint to the Temple. Defendants' counsel was precluded by the Court upon the State's objection from pursuing his examination of Officer Lindwall in an effort to establish the unlawful search and seizure of the paint and paint brush." (R 11)

The Supreme Court of Errors of the State of Connecticut held that the search of the Fahy premises and the seizure of the paint jar and paint brush were unlawful and were in violation of petitioners rights under the 14th Amendment to the Constitution and that the trial court committed error in admitting the unlawfully seized paint jar and paint brush. (Appendix B)

The admission of unlawfully obtained evidence which was itself considered by the trial court in reaching its verdict (R 11) also provided a basis for the admission of other damaging evidence. Thus the court found that:

> "The two-inch paint brush matched the markings made with black paint upon the synagogue." (R 11)

The court also found that:

> "Both defendants admitted that they were the ones who had painted the swastikas on the synagogue

and they admitted that the paint and the brush found in the car had been used by them for that purpose." (R 11)

Furthermore, the admission of the paint jar and paint brush corroborated and enhanced the credibility of the testimony of the state's leading witness, Officer Lindwall, to the effect that he had found a paint jar and paint brush under the front seat of Fahy's car while conducting a search of that vehicle at 4:40 a.m. on February 1, 1960.

Petitioners assigned as error the ruling of the trial court with respect to the admission of the paint jar and paint brush. (R 13) The Supreme Court of Errors of the State of Connecticut held that although the admission of the paint jar and paint brush had violated the petitioners constitutional rights, a new trial would not be granted because the illegally obtained evidence had not materially injured the petitioners since there was other evidence of guilt to support the convictions.

REASONS FOR GRANTING WRIT

The Connecticut Supreme Court of Errors has held that an error of constitutional dimension is harmless if there is sufficient other evidence of guilt to support a conviction.* So holding, it has bowed to the conclusion of this court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961) that "evidence obtained by searches and seizures in violation

*The Supreme Court of Errors of the State of Connecticut expressly held that the trial court committed error in permitting the respondent to introduce into evidence a paint jar and a paint brush which were obtained by means of an unlawful search and seizure (Appendix B). The constitutional issue, having been presented to and expressly decided by both the trial court and the Supreme Court of Errors, is properly before this Court for review. *Whitney* v. *California*, 274 U. S. 357 (1927); *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123 (1914); *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U. S. 182 (1945).

of the Constitution is inadmissible in a state court" and then placed itself squarely in conflict with the admonition of this Court in that same case that "the right to be secure against rude invasions of privacy by state officers . . . is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause." 367 U. S. 655 at page 660.

The holding of the court below relegates the constitutional safeguards of the Fourteenth Amendment to a mere rule of evidence rather than a constitutional standard for the conduct of criminal trials, the violation of which vitiates a conviction. The question posed is one on which the Courts of Appeals are presently in conflict. The Eighth Circuit and the District of Columbia Circuit have held that the admission of evidence obtained in violation of a constitutional right is never harmless error. *Williams* v. *United States*, 263 F2d 487, 490 (D. C. Cir. 1959); *Honig* v. *United States*, 208 F2d 916, 921 (8th Cir. 1953). This conclusion also appears as dictum in *Starr* v. *United States*, 264 F2d 377, 381 (D. C. Cir. 1958).

A contrary result was reached by the Second Circuit and by one case in the District of Columbia Circuit decided prior to *Williams* and *Starr*. *United States* v. *McCall*, 291 F2d 859, 860 (2d Cir. 1961); *Woods* v. *United States*, 240 F2d 37, 40 (D. C. Cir. 1956) cert. den. 353 U. S. 941. These cases hold that the violation of the constitutional rights of an accused does not require reversal of his conviction where there is ample evidence entirely unrelated to the tainted evidence upon which the trier of fact could base a conviction. This conclusion also appears as dictum in *Fraker* v. *United States*, 294 F2d 859, 861 (9th Cir. 1961).

Aside from the decision of this Court in *Mapp*, the only body of law to which the state courts may presently look for guidance as to the manner of enforcing constitutional guaranties against unlawful searches and seizures consists of

the small group of federal cases cited above, which were decided under the Fourth Amendment. As noted, these cases are hopelessly divided. Accordingly, we respectfully submit that it is imperative in the interests of uniform enforcement of the constitutional guarantees of the Fourteenth Amendment throughout the fifty states that certiorari be granted so as to resolve for all the question of whether the violation of constitutional rights of an accused by introduction of illegally seized evidence requires reversal of a conviction. This question, we submit, was erroneously resolved by the court below.

I

REVERSAL IS REQUIRED AS A MEANS OF ENFORCING THE CONSTITUTIONAL GUARANTEES AGAINST UNLAWFUL SEARCHES AND SEIZURES.

This court has repeatedly held that enforcement of rights guaranteed by the Fifth and Fourteenth Amendments requires reversal of all criminal convictions where unlawfully obtained confessions are admitted into evidence. *Rogers* v. *Richmond*, 365 U. S. 534, 545 (1960); *Malinski* v. *New York*, 324 U. S. 401, 404 (1944); *Lyons* v. *Oklahoma*, 322 U. S. 596, 597 (1943). For example in *Lyons* v. *Oklahoma*, 322 U. S. 596 this Court said:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of his confession denied a constitutional right to defendant the error requires reversal." 322 U. S. 596 footnote page 597.

The same conclusion was reached in *Rogers* v. *Richmond*, 365 U. S. 534:

"Our decisions under that Amendment [i.e. the 14th] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e. the product of coercion, either physical or psychological, cannot stand."

"Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which * * * an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees." 365 U. S. 534 at page 540

"A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment * * * To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension." 365 U. S. 534 at page 545

In *Mapp* v. *Ohio*, 367 U. S. 643 this Court, stressed the intimate relationship between the Fourth and Fifth Amendments, describing them as running "almost into each other" (367 U. S. 643 at page 646) and characterized the use of unconstitutionally seized physical evidence as "tantamount to coerced testimony." 367 U. S. 643 at page 656. After reviewing the history of enforcement by the state courts of the right to be free from unlawful searches and seizures, the Court concluded that effective enforcement of that constitutional right requires that the same stringent rule be ap-

plied as in the case of coerced confessions. (367 U. S. 643 at page 657).

Petitioners' convictions followed the admission of unconstitutionally obtained evidence and therefore the failure of the court below to grant a new trial was error.

II

PETITIONERS WERE DEPRIVED OF A FAIR TRIAL WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners' convictions must be reversed not only because their constitutional rights with respect to unlawful searches and seizures were violated but also because the admission of the unlawfully obtained evidence deprived them of a fair trial within the meaning of the Due Process Clause of the Fourteenth Amendment. The use of unlawfully obtained evidence by the prosecution should alway result in reversal of an ensuing conviction but reversal is even more mandatory where, as here, the unlawfully obtained evidence was offered by the prosecution and admitted by the court for the avowed purpose of establishing the guilt of the accused. Thus in *Bram* v. *United States*, 168 U. S. 532 (1897) the Court said:

> "Having been offered as a confession and being admissible only because of that fact a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a

confession was not prejudicial because it did not tend to prove guilt." 168 U. S. 532, at page 541.

In the instant case, the unlawful evidence was not only considered by the trial court as tending to establish guilt (R 11) but it also formed the foundation for the admission of other damaging evidence. The trial court found:

1. That the paint jar (State's Exhibit E) and the two inch paint brush (State's Exhibit F) were the same items which Officer Lindwall had purportedly seen in petitioner Fahy's car on February 1, 1960 (R 11).

2. That the unlawfully seized paint brush matched the markings made with black paint upon the synagogue (R 11).

3. That the petitioners admitted using the unlawfully seized articles to paint swastikas on the synagogue. (R 11)

Aside from these specific findings it is impossible to estimate or discover the overall impact which the unlawful evidence had on the trier of fact. Since the trial court expressly considered the tainted evidence in reaching its verdict, it is impossible for this Court or for anyone else to ascertain what part the unlawfully obtained evidence played in its decision. *Gallegos* v. *Colorado*, U. S. , 30 Law Week 4430 (1962); *Kotteakos* v. *United States*, 328 U. S. 750, 764 (1945); *United States* v. *Levi*, 177 F 2d 827, 831 (7th Cir. 1949). Accordingly, petitioners should be granted a new trial at which only lawful evidence will be considered.

CONCLUSION

In conclusion, on the facts and law, we respectfully urge this court to grant this Petition for the reason that these petitioners were deprived of their liberty and property without due process of law under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX A

Section 53-45 of the Connecticut General Statutes (1958) as amended by Public Act 437 (1959):

> "*Injury to public buildings, furniture or voting booths.* (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. (b) Any person who wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

APPENDIX B

STATE OF CONNECTICUT *v.* HAROLD FAHY
STATE OF CONNECTICUT *v.* WILLIAM ARNOLD

SUPREME COURT OF ERRORS

APRIL TERM, 1962

Judgment June 26, 1962

Announced July 10, 1962

Informations charging the defendants with the crime of wilful injury to public property, brought to the Superior Court in Fairfield County and tried to the court, *Bogdanski, J.*; judgment of guilty in both cases and appeal by the defendants. *No error.*

Francis J. McNamara, Jr., for the appellant (defendant in the first case).

John J. Sullivan, for the appellant (defendant in the second case).

John F. McGowan, assistant state's attorney, with whom, on the brief, was *Otto J. Saur*, state's attorney, for the appellee (state).

BALDWIN, C. J. The defendants were tried on separate informations charging wilful injury to public property under General Statutes § 53-45, as amended by No. 437, § 1, of the 1959 Public Acts. The factual and legal issues in the cases are identical, and the cases were tried together to the court without a jury. The court found the defendants

guilty as charged and sentenced each of them to sixty days in jail. They have appealed.

The trial court found the following facts: On February 1, 1960, between the hours of 4 and 5 a.m., swastikas were painted with black paint on the steps and on the casing between two basement windows of the Temple Beth Israel, on Concord Street in Norwalk. About 4:40 a.m., Osborn Lindwall, a Norwalk police officer, saw an automobile, without its headlights on, being operated on a public highway about a block away from this synagogue. He signaled the car to stop but was obliged to pursue it in his police car for about a mile before it was halted. The defendant Fahy was driving the car, and the defendant Arnold was a passenger. Lindwall questioned them about their reason for being out at that hour, and they told him that they had been to a diner for coffee and were going home. Fahy had no license to operate a motor vehicle, and the officer insisted that Arnold drive. The officer checked the car and found a jar of black paint and a two-inch paint brush under the front seat. He followed the car to Fahy's home. Later the same morning, he learned of the painting of the swastikas on the synagogue and reported that he had seen the defendants in that vicinity. Police officers then went to Fahy's home and placed both defendants under arrest. They found the jar of black paint and the brush in the car in which the defendants had been riding when they were stopped earlier in the morning. The two-inch paint brush matched the markings made with black paint on the synagogue. The defendants admitted that they had painted the swastikas on the synagogue and that the paint found in the car had been used for that purpose.

The defendants claim, first, that the informations do not charge an offense under General Statutes § 53-45, as

amended by Public Acts 1959, No. 437.[1] They concede that the synagogue is a public building but contend that the painting of the swastikas on it does not constitute a wilful injury within the intent of the statute. Their argument is predicated on the legislative history of this act. As originally enacted in 1832, the pertinent portion provided that, "if any person shall wilfully and maliciously injure or deface any house of public worship, school-house, or other public building," he should be subject to penalties. Public Acts 1832, c. 9, § 2; Statutes, 1838, p. 182, § 2. This wording continued without material alteration until the Revision of 1875, when the words "or deface" were omitted, among other changes. General Statutes, Rev. 1875, p. 500, § 3. Since 1875, the wording of the phrase with which we are concerned has remained unchanged. The defendants claim that by the omission of the words "or deface" the legislature intended to treat the word "deface" as distinct from the word "injure." They argue that although the painting of swastikas on a building may be a defacement, it is not an

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[1]Prior to the action of the 1959 legislature, the statute read: "Sec. 53-45. INJURY TO PUBLIC BUILDINGS, FURNITURE OR VOTING BOOTHS. Any person who wilfully injures any public building or wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

The 1959 public act, effective June 11, 1959, was as follows: "No. 437. AN ACT CONCERNING INJURY TO PUBLIC BUILDINGS. Section 1. Section 53-45 of the general statutes is repealed and the following is substituted in lieu thereof: (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. (b) Any person who wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

injury to the building. A contrary holding is to be found in *Vaughn* v. *May*, 217 Mo. App. 613, 625, 274 S. W. 969.

In seeking to ascertain the intent of legislation, "[i]t is presumed that changes in the language of a statute made when it is incorporated into a revision are not intended to alter its meaning and effect, and this is particularly true of the Revision of 1875." *Castagnola* v. *Fatool*, 136 Conn. 462, 468, 72 A.2d 479, and cases cited. It is therefore to be assumed that the revisers in 1875 considered that the word "injure" conveyed the meaning of "injure or deface." The words have been judicially interpreted as synonymous. *Saffell* v. *State*, 113 Ark. 97, 99, 167 S. W. 483. The 1959 public act (No. 437) by its terms purported to repeal § 53-45 of the 1958 Revision but at the same time again adopted the language of the 1875 Revision which is material to us. Whether a new provision is in the form of a new enactment repealing the old, as in this case, or the form of an amendment of the old is immaterial and depends on the preference of the draftsman. *Simborski* v. *Wheeler*, 121 Conn. 195, 200, 183 A. 688. The 1959 public act was, in effect, merely an amendment to § 53-45 of the General Statutes. See Prefatory Statement, Public Acts 1959. An amendatory act is presumed not to change the existing law further than is expressly declared or necessarily implied. *Norwalk* v. *Daniele*, 143 Conn. 85, 89, 119 A. 2d 732. Nothing in the 1959 act either expressly declares or necessarily implies a change in the meaning of the language under scrutiny. The informations therefore charged an offense under § 53-45 as amended by No. 437, § 1, of the 1959 Public Acts.

The defendants assign error in the alleged refusal of the trial court to allow them to pursue their cross-examination of Officer Lindwall in an effort to establish the unlawful search and seizure of a paint jar and paint brush from Fahy's car when it was in a garage under the house where

Fahy resided. After the date of the judgments, June 30, 1960, and while these appeals were pending, the Supreme Court of the United States announced its decision in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. This decision abrogated our prior law that relevant evidence, though obtained by unreasonable search and seizure in violation of the federal constitution, was admissible in evidence in our state courts. *State* v. *DelVecchio*, 149 Conn. (23 Conn. L. J., No. 31, p. 9); see *State* v. *Carol*, 120 Conn. 573, 575, 181 A. 714; *Pickett* v. *Marcucci's Liquors*, 112 Conn. 169, 173, 151 A. 526; *State* v. *Reynolds*, 101 Conn. 224, 233, 125 A. 636; *State* v. *Magnano*, 97 Conn. 543, 117 A. 550; *State* v. *Griswold*, 67 Conn. 290, 305, 34 A. 1046. The rule of *Mapp* v. *Ohio*, supra, applies to a pending appeal. *State* v. *DelVecchio*, supra.

The finding concerning the ruling on evidence assigned as error, as corrected by the trial court subsequent to the decision in *Mapp* v. *Ohio*, supra, and before argument before us, discloses the following: Lindwall testified that he went to the Fahy residence before obtaining a search warrant to search the premises and that he entered the garage and removed the paint jar and the paint brush from the car. The defendants sought to examine Lindwall in order to establish that the paint and the brush were unlawfully seized, in violation of their rights under the fourth and fourteenth amendments to the federal constitution and article first, § 8, of the constitution of this state. The court precluded the defendants from pursuing this examination, on objection by the state that any illegal seizure of the paint jar and the brush did not prevent their admission in evidence in a state court. In argument before us on April 3, 1962, the question was raised by the state whether the corrected finding was sufficient for us fully to consider the error claimed. After the argument, the defendants moved

that a certified transcript of the evidence taken at the trial be made a part of the record on appeal. The state acquiesced in the motion. Since the evidential ruling involved a matter as to which there had been a change in the law after the case was tried, the appeal taken and the original finding made, we granted the motion. *State* v. *Kreske,* 130 Conn. 558, 562, 36 A. 2d 389.

An examination of the transcript discloses the following: The state, in its case in chief, produced William Tarsi of the Norwalk police department. He testified that on February 1, 1960, at about 6:55 a.m., he observed swastikas painted in black paint on the synagogue, and that they had not been there when he observed the building at 4 a.m. that morning. The state then called Officer Lindwall, who testified to the facts already recited as having been found by the court, as follows: At about 4:40 a.m., he saw the Fahy car being operated, without lights on, about a block from the synagogue. He pursued the car until it stopped, and he questioned the defendants, who were riding in it. He observed a jar of paint and a brush in the car but did not take them into his custody. He allowed the defendants to proceed to Fahy's home and followed them until their car turned into the driveway.

The transcript further discloses the following evidence: When Lindwall learned, about 7:30 a.m., that swastikas had been painted on the synagogue, he went to Fahy's house, entered the garage and took the jar of paint and the brush from the car. On cross-examination, Lindwall testified that he entered the garage, that he removed the jar of paint and the brush from the car in the garage, and that he had no search warrant. Thereupon, he was asked whether he had applied for a search warrant, and the state objected. The court sustained the objection and refused to allow any further inquiry, on the ground, in effect, that the lack of a search warrant was immaterial.

Although the defendants objected to the admission of the paint jar and the brush when they were first offered, the objection was not at that time based on an illegal search and seizure, and the court was not asked to rule on their admissibility in the light of any such claim. See *Casalo* v. *Claro*, 147 Conn. 625, 629, 165 A.2d 153; *State* v. *DeGennaro*, 147 Conn. 296, 304, 160 A.2d 480. The reason for the requirement that there be timely objection and exception and also an adequate statement of the claims on which the objection is based, in compliance with the rules of procedure (Practice Book § 155), are well stated in a concurring opinion by Judge Van Voorhis in *People* v. *Friola*, 11 N. Y. 2d 157, 160, 182 N. E. 2d 100, a case which also involved the application of the *Mapp* decision, supra: "Courts are continually reconsidering old precedents and, if no objection or equivalent was required here, objection would never be necessary to raise a question of law where it is urged that some former decisional law be changed. That would not accord with the purposes of the rule requiring an objection, which is to apprise the court and the adversary of the position being taken when the ruling is made. It is important to know at the time that rulings are being challenged so that additional evidence or argument may be presented and the point considered by the trial court with knowledge that the rule is being contested."

The specific ruling of which the defendants complain is the refusal of the court to allow them to cross-examine Officer Lindwall to show that the search and the seizure were illegal. The transcript reveals that much of the necessary evidence was already in the case and, further, that the defendants had ample opportunity to, and in fact did, elicit testimony from Lindwall on cross-examination adequate to lay a foundation for their claim. While the defendants failed to make proper objection to the admission of the

evidence, they attempted later in the trial to raise the issue of the constitutionality of the search and the seizure, and we will consider it. See *People* v. *O'Neill*, 11 N. Y. 2d 148, 152, 182 N. E. 2d 95.

Security of one's privacy against arbitrary intrusion by the police is guaranteed by the federal constitution as well as by the constitution of this state. U. S. Const. Amend. IV, XIV § 1; Conn. Const. Art. I § 8; *Wolf* v. *Colorado*, 338 U. S. 25, 27, 69 S. Ct. 1359, 93 L. Ed. 1782. This protection extends to the premises where an unreasonable search is made. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374. Probable cause for a belief that certain articles subject to seizure are in a dwelling cannot in and of itself justify a search without a warrant. *Jones* v. *United States*, 357 U. S. 493, 497, 78 S. Ct. 1253, 2 L. Ed. 2d 1514; *Agnello* v. *United States*, 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145. There are no exceptional circumstances in this case which would warrant the search and seizure here—circumstances such as the necessity for immediate seizure lest the criminals flee, or the articles be transported out of reach, before a lawful warrant could issue. See *United States* v. *Jeffers*, 342 U. S. 48, 52, 72 S. Ct. 93, 96 L. Ed. 59; *Johnson* v. *United States*, 333 U. S. 10, 15, 68 S. Ct. 367, 92 L. Ed. 436; *Carroll* v. *United States*, 267 U. S. 132, 151, 45 S. Ct. 280, 69 L. Ed. 543. The search took place about two hours before the arrest and cannot be justified as incidental to it. *Rios* v. *United States*, 364 U. S. 253, 261, 80 S. Ct. 1431, 4 L. Ed. 2d 1688; *United States* v. *Di Re*, 332 U. S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210; *State* v. *DelVecchio*, 149 Conn. (23 Conn. L. J., No. 31, p. 9). The facts show that the officers had ample opportunity for procuring a search warrant without employing the method of illegal entry. See *Johnson* v. *United States*, supra. We conclude, therefore,

that the search and the seizure by Lindwall at 7:30 a.m. were unlawful, since they were without a warrant and were not made in connection with a lawful arrest at that time. Under the rule of *Mapp* v. *Ohio*, supra, 655, the evidence seized was inadmissible.

We come now to the question whether a new trial should be ordered. That depends on whether proper objection was made to the evidence claimed to have been erroneously admitted and whether the evidence was sufficiently consequential to affect the finding of guilt. We have already noted that the objection was insufficient to raise the constitutional question; nevertheless, we have considered that question on the basis of the court's ruling denying the defendants the right to cross-examine the police officer. The defendants do not claim, nor, as the transcript shows, could they claim, that the illegal search and sezure induced their admissions or confessions. Their claim is that, "[h]ad they been able to preclude the admission of the illegally seized evidence, [their] confessions would not have been admissible," under the rule of *State* v. *Doucette*, 147 Conn. 95, 98, 157 A.2d 487, because there was, apart from the confessions, insufficient evidence of the corpus delicti, that is, that the crime charged had been committed by someone. In other words, their claim is that the state, in order to prove that a crime had been committed, had to rely solely on the admission in evidence of the paint jar and the brush. The answer to that claim is that there was ample evidence besides the defendants' confessions and the jar of paint and the brush to prove that swastikas had been painted on the synagogue between the hours of 4 and 5 o'clock on the morning of February 1, 1960. This was sufficient to establish that the crime charged had been committed by someone. The confessions were not inadmissible on the ground claimed, and no other ground of inadmissibility is advanced.

The paint jar and the brush, which were exhibits, were, at most, cumulative. The transcript of the evidence of the state's case, in chief, discloses overwhelming evidence of the guilt of the defendants. They were observed a block from the scene of the crime at approximately the time when it was committed, riding in an automobile without lights, and were brought to a stop only after a police officer had pursued them for upwards of a mile. When the police later in the morning came with warrants to arrest them, they admitted their guilt at once and attempted to excuse their conduct as a "prank." Both later freely confessed. We are not required to grant a new trial if we are "of the opinion . . . errors [at the trial] have not materially injured the appellant." General Statutes § 52-265; *State* v. *Goldberger*, 118 Conn. 444, 454, 173 A. 216; *Carroll* v. *Arnold*, 107 Conn. 535, 544, 141 A. 657; *State* v. *Stevens*, 65 Conn. 93, 95, 31 A. 496; 1 Wigmore, Evidence (3d Ed.) § 21. Under the circumstances of this case, a new trial is unwarranted.

There is no error.

In this opinion the other judges concurred.